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In The

Supreme Court of the United States

JOHN EDWARD FISHER,

Petitioner,

v.

MARK HART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the reasonable-response requirement announced in *Farmer v. Brennan* satisfied by any action by a prison official—however minimal a gesture it may be—in response to a known risk to inmate safety, or does *Farmer* require that the official's response be objectively reasonable under the circumstances?

PARTIES TO THE PROCEEDING

Petitioner John Fisher files this petition with respect to his claims against Sergeant Mark Hart only. Additional appellees in the Court of Appeals were Terry L. Stewart, John Hallahan, and Paul Correll.

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PETITION FOR WRIT OF CERTIORARI

John Edward Fisher respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. App. 1-4. The order denying the petition for rehearing and dissent from denial of petition for rehearing are unreported. App. 17-21. The opinion of the District Court for the District of Arizona was unreported. App. 5-16.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals issued its decision on June 21, 2002. App. 1. The Court of Appeals denied Fisher's petition for panel rehearing on July 31, 2002. App. 17. This petition is being filed with the Clerk of this Court within 90 days from the date of the denial of the petition for rehearing.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

This appeal involves the Eighth Amendment of the United States Constitution, which provides that "Excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. App. 22. The Eighth Amendment applies to the States through the Fourteenth Amendment's due process clause. U.S. CONST. amend. XIV, cl. 1. Section 1983 of title 42 of the United States Code authorized Fisher's suit against Sergeant Mark Hart for deprivation of Fisher's federal constitutional rights. 42 U.S.C. § 1983. The text of 42 U.S.C. § 1983 is set forth in the petition appendix filed herewith. App. 23.

STATEMENT OF THE CASE

On June 9, 1999, John Edward Fisher filed a complaint under 42 U.S.C. § 1983 against Sergeant Mark Hart and other defendants in the United States District Court for the District of Arizona for violation of his Eighth Amendment right to be free of cruel and unusual punishment. Fisher sought compensation for injuries he suffered at the hands of another inmate. App. 7-8. The District Court had federal question jurisdiction over Fisher's claims. *See* 28 U.S.C. § 1331.

Fisher was brutally stabbed by a fellow inmate on July 1, 1998. *See* App. 27-28. The attack occurred shortly after Fisher, fearing for his safety, met with prison investigator Sergeant Mark Hart. App. 25-26. Hart was the sergeant in charge of "inmate investigations and gang related intelligence gathering" in Fisher's unit. App. 25. During their meeting, Fisher told Hart that two inmates known to Fisher only as "Psycho" and "Outlaw" had been using drugs and threatening and extorting Fisher and other inmates for payment of drug debts of others. App. 26. Psycho and Outlaw were cellmates and members of the notorious CRIPS street gang. *Id.*

Fisher, who was one of only a few inmates who had seen Psycho and Outlaw smoking marijuana, informed Hart of the risk that he would be identified as the informant if the two inmates were tested for drug use. *Id.* Hart, who was already aware of the inmates' drug-use and extortion activities, assured Fisher that Psycho and Outlaw would be placed in punitive detention that same day. *Id.* Hart then provided disciplinary paperwork to provide a "cover story" for their meeting, and allegedly offered to move Fisher to another area of the prison population. App. 7-8. According to Hart, Fisher refused the latter offer.[1] App. 8.

Contrary to Hart's assurances, both Psycho and Outlaw were tested for drug use that same day, and both were returned to Fisher's unit. App. 27. The next morning, Psycho was moved to punitive detention, while Outlaw was left at large. *Id.* Hart did not warn Fisher that, despite Hart's previous assurances, Outlaw would not be placed in punitive detention. Despite Hart's assurances to Fisher, and a prison policy that required that Fisher be placed in protective custody upon receipt of information that his safety might be in danger,[2] Hart kept Fisher and

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[1] Although not a point necessary to this petition, which focuses on the critical need for clarification of the *Farmer* reasonable-response requirement, it bears noting that for purposes of Hart's summary judgment motion, Hart's purported offer was not an undisputed fact. Indeed, Fisher attested that he had no recollection of Hart making such an offer. App. 26.

[2] Sergeant Hart had been trained regarding Director's Instruction No. 67, which provides that:

> Staff Members *shall immediately* place an inmate in detention status, pending completion of an assessment and investigation, when:. . . . Reliable and verifiable information is

(Continued on following page)

Outlaw together in the general population. *Id.* Later that day, Outlaw charged at Fisher, yelling "snitch," and stabbed Fisher in the back twice with a metal shank, collapsing his left lung and causing internal bleeding. App. 28.

The District Court granted summary judgment to Hart, concluding that the disciplinary papers and disputed offer to move constituted reasonable responses by Hart. App. 10, 15. Judgment was entered on January 8, 2001. Fisher appealed the District Court's judgment to the United States Court of Appeals for the Ninth Circuit, which had jurisdiction under 28 U.S.C. § 1291.

A panel of the Court of Appeals affirmed the District Court's judgment on June 21, 2002. App. 1-4. The panel concluded that "the information imparted to Hart provided him with knowledge of a substantial risk of harm to Fisher." App. 2. But the panel nevertheless held as a matter of law that "Hart took reasonable steps to abate any known risk, including offering to move Fisher out of his unit."[3] *Id.*

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received or known indicating that an inmate's safety *may* be in jeopardy.

App. 33 (emphasis added). The instruction describes the type of information that triggers the duty to place an inmate in detention status: "the nature of the threat, the names of the victimizers and the reasons for the threat. . . . " App. 34. If the inmate refuses a move into detention, the officer must either obtain the inmate's written waiver or have two witnesses attest to the inmate's refusal. *Id.* Hart did neither.

[3] The panel ignored Fisher's sworn statement that "At no time do I recall Hart ever asking me if I would like to be moved to another location in the Cimarron Units [sic] general population." App. 26.

Fisher sought panel rehearing. On July 31, 2002, a divided panel denied Fisher's petition for rehearing. App. 17. The Honorable Donald P. Lay, Senior United States Judge for the Eighth Circuit, sitting by designation, dissented from the denial of rehearing. App. 17-21. In his dissent, Judge Lay concluded that the panel had disregarded evidence that would allow a fact-finder to find that Hart had not responded reasonably to a known threat. App. 18-20. Judge Lay concluded by stating:

> There is a dire national need to recognize and deter the brutality that occurs in prison environments among inmates. Such brutality will never be deterred when courts continuously provide a protective immunity to prison officials under factual records such as we confront here.

App. 21.

REASONS FOR GRANTING THE WRIT

This case provides the Court with an opportunity to clarify the legal standard for determining whether a prison official responded reasonably to a substantial risk of serious harm of which the prison official was subjectively aware. The Court announced the reasonable-response requirement more than eight years ago in the landmark decision of *Farmer v. Brennan*, 511 U.S. 825 (1994), which established that deliberate indifference requires subjective knowledge. Although *Farmer* established that a reasonable response would absolve even a prison official with subjective knowledge, the Court did not set forth a standard for determining what constitutes a "reasonable response." *Id.* at 844-45. Nor did the Court

The district court did not abuse its discretion in denying Fisher's motion for appointment of trial counsel under 28 U.S.C. § 1915. Fisher failed to establish a genuine issue of fact as to his claims against Hart, Correll, and Hallahan, and as such has not demonstrated a high likelihood of success on the merits. *See Wilborn v. Escalderon,* 789 F.2d 1328, 1331 (9th Cir. 1986). Further, despite his claim that the legal issues in this case were complex, Fisher has been able to clearly and succinctly state his arguments, with appropriate legal support, throughout the pendency of his litigation. *See id.* He has therefore failed to establish "exceptional circumstances" warranting the appointment of trial counsel. *See id.*

The district court did not abuse its discretion in denying Fisher's motion for in camera review of certain documents. Fisher has not shown how exclusion of the information provided in these internal prison documents resulted in "actual and substantial prejudice" as none of the requested documents would have provided probative and relevant evidence establishing that the prison officials in question were deliberately indifferent to Fisher's health and safety. *See Hallett,* 287 F.3d at 1212.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN EDWARD FISHER, Plaintiff, vs. TERRY L. STEWART, et al., Defendants.	No. CIV 99-301-TUC-WDB **ORDER** (Filed Jan. 8, 2001)

Pending before the Court is a Motion for Summary Judgment filed by Defendants Hart, Correll, and Hallahan, the sole remaining defendants in this case. Fisher alleges that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. Because Fisher has not provided evidence from which a reasonable jury could infer that Defendants violated his Eighth Amendment right by being deliberately indifferent to his health and safety, the motion for summary judgment will be GRANTED.

Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If "the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," "summary judgment will not lie." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986). Moreover, in evaluating a motion for summary judgment, the court "may not make credibility determinations or weigh conflicting evidence." *Bator v. Hawaii*, 39 F.3d 1021, 1026 (9th Cir.1994). Instead, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

Eighth Amendment

A prison official cannot be found liable under the Eighth Amendment for cruel and unusual punishment unless he or she is "deliberately indifferent" to an inmate's health or safety. Deliberate indifference cannot be established "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A prison official's knowledge is a question of fact. *Id.* at 842. In consideration of a motion for summary judgment by prison authorities, the issue is whether the prisoner has presented sufficient evidence to permit a reasonable jury to find the requisite knowledge and "subjective culpability." *Id.* at 842. n. 8. Furthermore, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844.

Defendant Hart

Factual background

The facts leading up to the alleged violations of Fisher's Eighth Amendment right, when viewed in the light most favorable to him, are as follows. Fisher's complaint arises out of an incident in which he was stabbed after informing on a fellow inmate for drug dealing and use. According to Fisher, two black inmates, "Psycho" and "Outlaw" dealt drugs to inmates. Several white inmates ran up tabs but failed to pay them off before being transferred away. Psycho and Outlaw then began to extort the remaining white inmates by threats of violence to pay off the debts of the departed white inmates.

On June 30, 1998, Fisher contacted Defendant Hart, a prison investigator, to speak with him in private. Fisher informed Hart that: (1) Psycho and Outlaw, who lived in Fisher's unit, were threatening him and other white inmates and that Fisher feared for his own safety, and (2) he had observed Psycho and Outlaw smoking marijuana. Fisher told Hart of the marijuana use in hopes that Psycho and Outlaw would be kept in lockdown. Fisher asked that Hart not to obtain urine samples from the two feared inmates until those two were in detention because Fisher was concerned that he would be exposed as the informant. Fisher was "one of only a couple inmates" who observed the two feared inmates smoking marijuana. *See* Plaintiff's Motion in Opposition of Defendants' Motion for Summary Judgment, Ex. A, Affidavit of Fisher at ¶ 12.

Hart told Fisher that Psycho and Outlaw would be removed from the general population and placed in detention later that day. At Fisher's request, Hart gave him disciplinary paperwork so Fisher would have a "cover

story" to explain his conversation with prison authorities. Hart also offered to have Fisher removed from the unit for his safety. Fisher responded that he did not think that he would face harm in the general population because of his statute [sic] as a long term inmate. Fisher does not deny Hart's offer or his own response but states only that "At no time do I recall Hart ever asking me if I would like to be moved to another location of the Cimmaron Units [sic] general population." *See* Fisher affidavit at ¶ 13.

That evening, prison official required Psycho and Outlaw to provide urine samples.

The next morning, on July 1, prison officials removed Psycho from Fisher's unit.

On the afternoon of July 1, Outlaw stabbed Fisher, apparently in retaliation for snitching. The weapon punctured Fisher's lung.

Discussion

Hart is liable for violating Fisher's Eighth Amendment right only if either (1) there were facts from which an inference could be drawn of a substantial risk of serious harm and he drew that inference or (2) Hart failed to take reasonable steps to avert that risk. *See Farmer*. Because Fisher has not presented evidence from which a reasonable jury could infer that Hart was liable under either of those theories, summary judgment is appropriate.

There were not facts from which an inference could be drawn of a substantial risk of serious harm

Given the evidence above, Fisher cannot establish that there is a genuine issue of material fact as to Hart's

alleged deliberate indifference to Fisher's safety. The evidence offered by Fisher does not establish facts from which an inference could be drawn that a substantial risk of serious harm existed at the time Hart took his actions. Fisher states that Psycho and Outlaw "directed threats of physical violence" at Fisher and others and that Fisher expressed a fear for his own personal safety. With the benefit of hindsight. Fisher had good reason to be concerned. However, at the moment Fisher spoke with Hart, while Fisher expressed fear of some harm, there is no indication he thought he faced a substantial risk of serious harm. In fact, Fisher refused Hart's offer to move him to another unit, showing that Fisher himself had little fear. Fisher did not appear to be concerned with serious harm so it would be unreasonable for a jury to find that Hart should have concluded that Fisher faced a substantial risk of serious harm.

Fisher argues that he refused Hart's offer to move him because he believed Hart's assurances that Psycho and Outlaw would be moved the same day. However, Fisher has submitted no evidence that Hart was personally responsible for failing to move the two inmates or that Hart misinformed Fisher as to his belief that the two inmates would be moved. Thus, no reasonable jury could infer that Hart was deliberately indifferent based on the failure to move the two inmates.

Fisher also argues that failure to follow "Director's Instruction #67 – Protective Segregation" shows Hart's deliberate indifference to his health and safety. That directive, in § 1.2.2.2, provides that inmates shall be placed in protective custody when reliable and verifiable information is received that an inmate's safety may be in jeopardy. However, violation of a prison directive is not, in

and of itself, evidence of a constitutional violation. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc). Thus, it is unnecessary to determine whether Hart violated the prison directive to consider the constitutional issue at issue in this case.

Given the above, Fisher has failed to present sufficient evidence to permit a reasonable jury to find that Hart was deliberately indifferent to Fisher's health and safety because he knew of and disregarded a substantial risk of serious harm to Fisher. Therefore, summary judgment is appropriate as to Hart.

Hart took reasonable measures to avert the risk

Even assuming, arguendo, that Hart knew of a substantial risk to Fisher's health and safety, Hart took reasonable measures to avert that risk and is therefore not liable. Hart provided Fisher with disciplinary paperwork to give him a cover story for talking to Hart. Hart also offered to move Fisher to another location. Thus, Hart offered Fisher deniability and physical isolation. Given the circumstances of this case, these measures appear to be reasonable steps to avert the a substantial risk to Fisher. Therefore, Hart faces no liability under the Eighth Amendment for harm to Fisher.

Defendant Correll

Factual Background

Defendant Correll manned the control room which overlooked the area where Fisher was stabbed. The stabbing occurred shortly after Correll electronically released the inmates from their cells to go to lunch. The

area was dark and was unlit by security lights. Furthermore, on the day of the stabbing, Correll was the only prison official in the area. Ussually [sic], there is both a control room officer and a floor officer.

At the time of the stabbing, Correll was seated and paying no attention to the inmates, according to Fisher's affidavit. Correll did not observe the stabbing.

After Fisher was stabbed, he returned to his cell where another inmate removed the 'ice-pick' weapon from his back and cleaned the wound. The other inmate then banged on the cell door until Correll electorically [sic] opened it. Fisher then approached the control room to tell Correll that he had been stabbed and needed medical treatment. Correll told Fisher to "go now," gave him a pass to go to the Health Unit for medical treatment, and electronically opened two doors to allow Fisher and the inmate accompanying him to walk to the Health Unit.

When Fisher attempted to pass through another locked door on his way the Health Unit, an unnamed officer refused to let him pass. Fisher waited in the July sun until Hart escorted him into the Health Care Unit, where Fisher received emergency medical treatment, about 40 minutes after the stabbing. He was later transferred to St. Mary's Hospital and was discharged five days later. The discharge report noted that he had "done well." Fisher alleges in his complaint that he has suffered mental distress, severe stomach and bowel problems, and severe hemorrhoids as a result of the stabbing but has produced no evidence to support any of these allegations.

There is evidence that Correll failed to follow proper procedure in dealing with Fisher's injury. An Arizona DOC report states that a prison official told Correll that he

should have "activated IMS" immediately upon learning of Fisher's injury. Correll's explanation for his failure to do so was that it was about time to go home. There is no evidence in the record regarding what IMS is or how it affected the medical response to Fisher's injury.

Discussion

Fisher makes two claims against Correll alleging deliberate indifference. First, Fisher alleges that Correll was deliberately indifferent for failing to insure Fisher's safety. Fisher alleges that Correll's deliberate indifference can be inferred from the lack of security lighting, Fisher's inattention, and the lack of a floor officer. As to the first two bases Fisher cites, those tend to indicate negligence. Negligence does not support a § 1983 claim. *See Estelle v. Gamble*, 429 U.S. 97, 105 (1976). A reasonable jury could not infer from those facts that Correll know of a substantial risk of serious harm to Fisher and disregarded it. As to the third basis Fisher cites, Fisher provides no evidence that Correll was personally responsible for the lack of a floor officer and, therefore, a reasonable jury could not infer from that fact that he was deliberately indifferent.

Second, Fisher alleges that Correll was deliberately indifferent to obtaining medical care for him after he told Correll of his injury. Prison officials violate a prisoner's Eighth Amendment rights if they are deliberately indifferent to his serious medical needs. *See id.* In general, "officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment." *Hunt v. Dental Dept.*, 865 F.2d 198, 201 (9th Cir. 1989) (internal quotation

marks omitted). However, absent harm, delay in treatment, without more, is not enough to show deliberate indifference. *See Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990).

Given the evidence above, Fisher cannot establish that there is a genuine issue of material fact as to Correll's alleged deliberate indifference to Fisher's safety. First, Fisher has not offered evidence of harm beyond a delay in treatment. Defendants have submitted evidence that Fisher recovered well from his injury; Fisher has offered no evidence to contradict that. *See* Defendants' Court Ordered Report, Ex. C. Second, even if the Court assumes there was a delay in treatment, there is no evidence that Correll was responsible for that delay. Fisher's affidavit states when he told Correll that he needed medical treatment, Correll immediately took a number of steps to expedite that treatment – Correll gave him a pass, told him to "go now," and electronically opened two doors to allow Fisher to get to the Health Unit. *See* Fisher Affidavit at ¶ 23. An unidentified officer may have delayed Fisher's entrance to the Health Unit but Fisher does not provide facts from which an inference can be drawn that Correll was responsible for that delay. No inference can be drawn from Correll's failure to activate IMS because Fisher provides no evidence as to what IMS is or what would have happened had IMS been activated.

In sum, there is no evidence that Correll was responsible for any delay nor any evidence that a delay caused any harm.

Fisher makes further allegations, e.g., that Correll failed to call ahead to the Health Unit, call a medical alert, obtain onsite health care for Fisher, or get a staff escort for

Fisher to the Health Unit. *See* Fisher Response at p. 11. The first of these allegations is unsupported and even contradicted by evidence Fisher himself submitted in his response – Correll's report of the incident indicates that he *did* call ahead to the Health Unit to notify an officer that Fisher was on his way. *See* Fisher's Ex. F. at 2. All of the allegations are irrelevant given that Fisher does not allege that a delay in treatment caused him harm.

Given the above, Fisher has failed to present sufficient evidence to permit a reasonable jury to find that Correll was deliberately indifferent to Fisher's health and safety. Therefore, summary judgment is appropriate as to Hart.

Defendant Hallahan

Factual Background

Fisher's claim against Defendant Hallahan is supported by two pieces of evidence. First, Fisher's wife in an affidavit testifies that for a few months prior to this incident, she complained at least 8 times, at least once by letter, to Hallahan's office about (1) unjustified investigations into Fisher's alleged drug dealing, (2) harassment of Fisher's family when they visited, and (3) improperly moving Fisher to the Cimarron Unit, where he was later stabbed. *See* Fisher's Response, Ex. I. Second, Fisher wrote a letter to Hallahan complaining of the first and second abuses alleged by his wife. *Id.*

Discussion

Given the evidence above, Fisher cannot establish that there is a genuine issue of material fact as to

Hallahan's alleged deliberate indifference to Fisher's safety. First, Fisher has presented no evidence showing that Hallahan received the communications from Fisher or his wife regarding these complaints. Second, even had Hallahan received these communications, neither of them mentions any danger to Fisher's health or safety. Fisher's wife's complaint comes closest, stating that Fisher "had been prematurely moved to A.S.P. Tucson/Cimarron Unit – a higher custody facility without central classification clearance." However, a reasonable jury could not infer from that evidence that Hallahan knew of an excessive risk to Fisher's health or safety because the complaint mentions no threat to his health or safety. Thus, Fisher has failed to present evidence such that a reasonable jury could return a verdict in his favor and summary judgment is appropriate.

Conclusion

For the above reasons, Fisher has not presented evidence such that a reasonable jury could return a verdict against any of the defendants, and summary judgment is appropriate as to all remaining counts and all remaining defendants.

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED and the claims considered in this motion are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that because this order terminates all counts against all defendants remaining in this case, the case is DISMISSED.

DATED this 8th day of January, 2001.

/s/ William D. Browning
William D. Browning
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN EDWARD FISHER, Plaintiff-Appellant, v. TERRY L. STEWART, Defendant, and JOHN HALLAHAN, et al., Defendants-Appellees.	No. 01-15433 D.C. No. CV-99-00301-WDB ORDER (Filed Jul. 31, 2002)

Before: LAY,* THOMPSON and TALLMAN, Circuit Judges.

Judges Thompson and Tallman have voted to deny the petition for panel rehearing. Judge Lay has voted to grant the petition for panel rehearing and his dissent is attached to this Order.

The petition for panel rehearing is DENIED.

LAY, Circuit Judge, dissenting.

After reviewing the petition for panel rehearing, I would vote to grant the petition on two grounds: (1) the panel improperly concluded that no genuine issue of material fact existed as to Hart's offer to place the

* Honorable Donald P. Lay, Senior United States Judge for the Eighth Circuit, sitting by designation.

attempt to apply the requirement to the facts in that case. Faced with this doctrinal vacuum, the courts of appeals have treated very similar facts very differently with the result that prisoners in some circuits have been afforded greater Eighth Amendment protections than those in others.

Some circuits, like the Ninth Circuit in this case, effectively have held that *any* response is a "reasonable response." These courts have failed to give any content to the term "reasonable" and thereby undermined the safeguard intended by the reasonable-response requirement. In this case, the Ninth Circuit disregarded evidence that would allow a reasonable fact-finder to determine that Sergeant Hart's actions were not reasonable under the circumstances. Other circuits have held that whether the official's response was reasonable must be evaluated by the fact-finder in light of the circumstances as a whole, including the official's subjective knowledge.

The Ninth Circuit's cursory and erroneous disposal of this case demonstrates that the reasonable response requirement in the *Farmer* analysis needs clarification. This case affords an opportunity to provide illustrative specificity to that requirement and to clarify the attendant duty of prison officials with subjective knowledge of a threat of violence. This Court should resolve the split between the circuits by making clear that a "reasonable response" requires more than just a minimal gesture, and that, assuming a prison official has the requisite subjective knowledge, whether the prison official's conduct is reasonable must be judged in light of all the surrounding circumstances.

A. The Circuits Have Applied *Farmer v. Brennan*'s Reasonable-Response Requirement Inconsistently.

1. *Farmer* Announced the Requirement that a Prison Official with Subjective Knowledge of a Substantial Risk of Serious Harm to an Inmate Respond Reasonably, But Did Not Provide Guidance on the Meaning of a "Reasonable Response."

The *Farmer* Court announced that a prison official's reasonable response to a subjectively known threat would relieve the official of liability.[4] But the Court addressed the reasonable-response requirement in only three brief sentences and did not apply the requirement to the facts in that case. Moreover, the Court expressed uncertainty as to the doctrinal moorings of the requirement: "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." 511 U.S. at 845; *cf. Brown v. Harris*, 240 F.3d 383, 389 (4th Cir. 2001) ("[T]he Court left open the question of whether the 'reasonable response' prong of *Farmer* is part of the state of mind requirement or whether it instead stems from the duty to 'ensure reasonable safety'. . . ."). Perhaps because of this doctrinal uncertainty, the circuits have taken irreconcilable approaches to the application of the reasonable-response standard.

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[4] *Farmer*, 511 U.S. at 844-45 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.").

In the wake of *Farmer*, at least seven circuits have applied the reasonable-response requirement to cases factually analogous to Fisher's. The courts of appeals have followed two distinct approaches. Some circuits have treated *any* response by the prison official (even if minimal and in violation of common sense or prison regulations) as *per se* reasonable. *See, e.g., Brown*, 240 F.3d 383; *Lewis v. Richards*, 107 F.3d 549 (7th Cir. 1997). Other circuits have applied a more meaningful test for reasonableness and evaluated whether the official's response was reasonable under the circumstances in light of that official's subjective knowledge. *See, e.g., Giroux v. Somerset County*, 178 F.3d 28 (1st Cir. 1999); *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997); *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614 (2d Cir. 1996); *Reece v. Groose*, 60 F.3d 487 (8th Cir. 1995).

2. Some Courts Have Concluded That Any Response by the Responsible Prison Official Suffices as "Reasonable."

The majority and concurring opinions in the Seventh Circuit's *Lewis v. Richards* decision illustrate the two competing approaches. 107 F.3d 549 (7th Cir. 1997). The majority and concurring judge disputed the meaning of a "reasonable response." In *Lewis*, the plaintiff had been verbally threatened, labeled a "snitch," and sexually assaulted by members of a prison gang. *Id.* at 551-52. Although the plaintiff twice had reported the assault to prison officials, he was not placed in protective segregation until ten days after a second attack. *Id.* The majority held that "[h]ad the defendants in this case simply refused to do anything, Lewis' case might survive summary judgment," but that the defendants had at most "exercised poor judgment" in their response to the threat. *Id.* at 553-54. The *Lewis* majority's approach is tantamount to a rule

that officials who do *something* in response to the threat have responded reasonably *per se*. As Circuit Judge Flaum explained in a concurring opinion, the majority misunderstood the *Farmer* reasonable-response requirement:

> [The majority] acknowledges that "[h]ad the defendants in this case simply refused to do anything, Lewis' case might survive summary judgment." This standard, however, is not *Farmer*'s. Under *Farmer*, prison officials "may be found free from liability if they responded *reasonably* to the risk." . . . [T]he majority could be read to suggest that a plaintiff in Lewis's position need prove, not only that officials knew of a risk of harm, but also that they "refused to do anything" in response. *Farmer*, of course, does not set so heavy a burden. Minimal gestures in response to known risks will not absolve prison officials of liability.

Id. at 557 (Flaum, J., concurring) (citations omitted); *cf. Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996) ("[I]n order to establish the liability of a prison official, a plaintiff must establish that the official knew of the risk (or a high probability of the risk) and *did nothing*.") (emphasis added).

The Fourth Circuit in *Brown v. Harris* approached the reasonable-response analysis in the same manner as the *Lewis* majority. 240 F.3d 383 (4th Cir. 2001). *Brown* involved a pretrial detainee who committed suicide in county jail by hanging himself with his own shoelaces. A jail official, knowing that Brown was suicidal, placed him under video surveillance. The official failed to order a medical examination or place the detainee in a paper gown, even though the official admitted that he ordinarily would do so for a suicidal detainee and should have done

so. *Id.* at 390. The Fourth Circuit nonetheless concluded that this response was "reasonable" because he did not "disregard" the risk. *Id.* In essence, the Fourth Circuit held that an official who takes *some* action in response to a known risk responds reasonably as a matter of law.

The Ninth Circuit in this case followed the approach of the *Lewis* and *Brown* decisions by ruling that Hart's minimal gestures compelled the conclusion that Hart acted reasonably as a matter of law. Relying on Hart's contention that he offered to move Fisher the Ninth Circuit disregarded evidence that when Hart allegedly made that offer, he also assured Fisher that the two threatening inmates would be segregated. Contrary to Hart's assurances, both inmates were tested for drug use—thereby exposing Fisher as an informant—and both were returned to Fisher's unit. Only Psycho was eventually detained. Hart did not even provide Fisher with a warning, much less renew his alleged offer to move Fisher in light of these changed circumstances. Moreover, the prison's own internal policies required Hart to move Fisher upon receiving knowledge that Fisher's safety might be in jeopardy. Hart failed to do so. On these facts, the Ninth Circuit improperly concluded that Hart responded reasonably as a matter of law.

3. The Ninth Circuit's Application of the Reasonable-Response Requirement Conflicts with Decisions in the First, Second, Third, and Eighth Circuits.

Decisions from the First, Second, Third, and Eighth Circuits are illustrative of an approach that gives meaning to the term "reasonable" as used in the *Farmer* opinion. These courts have held that when an official subjectively knows of a substantial threat of serious harm to inmate

safety, minimal gestures are not reasonable *per se*. Instead, whether the official's response is reasonable must be evaluated in light of the circumstances as a whole, including the official's subjective knowledge.

In *Hayes v. New York City Department of Corrections*, for example, the Second Circuit concluded that the reasonableness of a prison official's response was a question of fact for the jury. 84 F.3d 614 (2d Cir. 1996). The plaintiff's repeated attempts to warn officials of the threat presented by the eventual attacker and repeated requests for a transfer went unheeded, and three separate attacks resulted. 84 F.3d at 621. The defendants conceded that policy and practice dictated that inmates in the plaintiff's position be given "special protective measures" and relocation. *Id.* An official "with principal responsibility for security" met with the plaintiff to discuss the threats, but denied the plaintiff's request for a transfer. *Id.* Under these facts, the court held that the defendants could not be found to have responded reasonably as a matter of law. *Id.*

The First Circuit took a similar approach in *Giroux v. Somerset County*, 178 F.3d 28 (1st Cir. 1999). In that case, the plaintiff's fellow inmates saw him with a detective and assumed that he was an informant. 178 F.3d at 30. An inmate with whom he shared a common room began threatening him, and continued to do so even after Giroux was moved to another cell. *Id.* Prison officials moved Giroux to protective segregation, but later placed him in the same holding cell as the threatening inmate, who violently attacked him. *Id.* The First Circuit concluded that the official had knowledge of the threat and that a reasonable jury could conclude that he failed to take the

actions necessary "to reasonably protect the inmates in his custody." *Id.* at 34.

The Third and Eighth Circuits have followed similar approaches. In *Hamilton v. Leavy*, the Third Circuit held that whether prison officials had acted reasonably was a question of fact when those officials had recommended that an inmate who had been "brand[ed] as a 'snitch'" be placed in protective custody, but failed to follow up on that recommendation. 117 F.3d 742, 747 (3d Cir. 1997). Despite the defendants' insistence that they "did everything they could" by recommending that the plaintiff be placed in protective custody, the Third Circuit concluded that the district court had erred by refusing "to consider whether the . . . defendants could have taken further action." *Id.* at 748. The court held:

> [W]hile it appears that the . . . defendants acted reasonably in following the internal prison procedures by recommending . . . that [plaintiff] be placed in protective custody, the reasonableness of their actions following the rejection of that recommendation remains a question.

Id. In other words, even though the defendants had complied with internal procedures, and even though they had recommended that the plaintiff be placed in protective custody, there was still a question of fact as to whether their response was reasonable. By contrast, the Ninth Circuit in this case focused narrowly on Hart's alleged offer to move Fisher and concluded that this minimal gesture, though not in compliance with prison regulations, rendered Hart's actions reasonable as a matter of law. App. 2. The Ninth Circuit's approach cannot be reconciled with the approach followed by the Third Circuit in *Hamilton*.

Similarly, the Eighth Circuit in *Reece v. Groose* recognized that a fact-finder could conclude that prison officials

had failed to respond reasonably to the dangers faced by a known informant, even though the prison officials had placed the inmate in protective custody. 60 F.3d 487, 488 (8th Cir. 1995). The plaintiff had been placed in protective custody for his safety, but prison officials permitted an inmate known for his violent propensities to serve as a custodian in the protective-custody unit. *Id.* When walking by the plaintiff's cell, the inmate-custodian doused the plaintiff with hot water, causing first-degree burns. *Id.* at 489. Even though there was no indication that the attacker had threatened the plaintiff, and no complaint from the plaintiff that the attacker had targeted him, the court ruled that fact issues precluded the conclusion that prison officials responded reasonably as a matter of law. *Id.* at 491.

In this case, Fisher warned Hart of the specific threatening inmate. Hart disregarded a prison regulation that if followed would have prevented the attack.[5] Hart

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[5] This petition does not present the question of whether the violation of a state prison regulation constitutes an unreasonable response *per se*. *Cf. Hall v. Mertz*, 480 P.2d 361, 363 (Ariz. Ct. App. 1971) ("It is the law in this State that whenever a valid statute or regulation provides that a certain thing must or must not be done, if a failure to comply with such regulation is a proximate cause of injury to another, such failure is actual negligence *per se*."); RESTATEMENT (THIRD) OF TORTS § 14 (Tentative Draft No. 1, 2001) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."). Fisher does not contend that a prison-regulation violation, without more, establishes a violation of the Eighth Amendment. *See Langston v. Peters*, 100 F.3d 1235, 1238 (7th Cir. 1996). This petition presents only the narrow issue of the meaning of "reasonable" in the context of a prison official's response to a threat of inmate violence, and does not require a holding that the violation of a prison regulation renders the official's response *per se* unreasonable.

expressly credited Fisher's warnings but did nothing to segregate him from the source of the threat. The Ninth Circuit nevertheless followed the approach of the *Lewis* and *Brown* decisions by concluding that Hart's response was reasonable as a matter of law simply because he did *something*. In doing so, the panel disregarded facts that would allow a rational fact-finder to conclude that Hart's response was *not* reasonable. With the circuits at odds over the correct application of the reasonable-response requirement, this Court should grant certiorari to establish that the courts must give effect to *Farmer*'s use of the word "reasonable" before "response."

B. This Case Provides an Opportunity for this Court to Clarify the Reasonable-Response Requirement.

Fisher's case provides an opportunity for this Court to clarify the legal standard for determining the reasonableness of the response of a prison official who has subjective knowledge of a substantial threat of serious harm to an inmate's safety. The record here presents a simple, unequivocal marker of the line between (1) responses that are reasonable as a matter of law, and (2) responses, such as Hart's, that a jury could justifiably find so minimal and misleading as to fail the *Farmer* standard.

Fisher approached Hart with information about two specific inmates that had been threatening and extorting Fisher and other inmates, and offered evidence of both drug abuse and drug dealing by the threatening inmates. Hart confirmed his knowledge of the threatening inmates' activities, and thus prison policy required him to either place Fisher in protective segregation or obtain a signed waiver to such a move. Hart disregarded this duty, and

further disregarded the warnings that immediate drug tests would expose Fisher as the informant. Hart did not place Fisher in protective custody. Nor did he place both threatening inmates in detention. Instead, Hart chose the most dangerous alternative under the circumstances: he detained only one of the threatening inmates—leaving the other free to retaliate—without so much as a verbal warning to Fisher that the other remained in the general population.[6]

Despite these facts, the Ninth Circuit undermined the duty to ensure reasonable safety by determining that Hart's minimal gestures were reasonable *as a matter of law*. Eight years after *Farmer* announced the reasonable-response requirement and with numerous circuit-court decisions on the issue now decided, the time is ripe for clarification of the requirement and for this Court's guidance as to how the requirement should be applied to a concrete set of facts. As it now stands, both courts and the prison officials who must address prison violence on a daily basis are operating without a definitive precedent on the response required when a threat is identified. In the absence of more certain guidance from this Court on an official's duty to respond *reasonably* to threats of violence, the "dire national need to recognize and deter the brutality that occurs in prison environments among inmates" will continue to go unmet. App. 21. " '[T]reatment of crime and criminals is one of the most unfailing tests of civilization of

[6] Hart did not aver that he lacked authority to put Psycho and Outlaw in punitive detention or to move Fisher into protective custody, or that he was incapable of implementing protective measures. *Cf. Hamilton*, 117 F.3d at 748 (rejecting prison officials' argument that once recommendation for protective custody was made, they bore no responsibility for seeing that affirmative protective measures were taken).

any country.'" *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 84 (6th Cir. 1995) (quoting Winston Churchill).

CONCLUSION

Justice Blackmun's assertion that the *Farmer* opinion sent a "clear message . . . that prison officials must fulfill their affirmative duty under the Constitution to prevent inmate assault," 511 U.S. at 858 (Blackmun, J., concurring), is undermined by the circuits' inconsistent approaches to determining whether a prison official's response to a known risk of harm was a reasonable response. This Court should grant certiorari to give substance to the meaning of the reasonableness requirement. This clarification would ensure that when a prison official actually knows of a substantial threat of serious harm, he cannot escape liability by showing that he made minimal gestures that a fact-finder might find unreasonable under the circumstances.

For the foregoing reasons, the Court should grant Fisher's petition for writ of certiorari.

Dated: October 29, 2002

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN EDWARD FISHER,

Plaintiff-Appellant,

v.

TERRY L. STEWART,

Defendant,

and

JOHN HALLAHAN; HART; CORRAL,

Defendants-Appellees.

No. 01-15433
D.C. No.
CV-99-00301-WDB
MEMORANDUM*

(Filed Jun. 21, 2002)

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Argued and Submitted June 14, 2002
San Francisco, California

Before: LAY**, THOMPSON and TALLMAN, Circuit Judges.

Appellant John Edward Fisher ("Fisher"), an Arizona Department of Corrections Inmate, appeals the district

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** Honorable Donald P. Lay, Senior United States Judge for the Eighth Circuit, sitting by designation.

court's adverse summary judgment of his claims under 42 U.S.C. § 1983. Fisher also appeals the dismissal of his claims against former defendants Buck and Robinson, the denial of his motion for appointment of trial counsel, and the denial of his motion for in camera review. Because the parties are familiar with the facts, we do not detail them here. We affirm.

The district court did not err in granting summary judgment in favor of Appellees Hart, Correll, and Hallahan. Although "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," only a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eight [sic] Amendment. *Farmer v. Brennan*, 511 U.S. 825, 828-33 (1994).

Viewing the evidence in the light most favorable to Fisher, as required on summary judgment, the information imparted to Hart provided him with knowledge of a substantial risk of harm to Fisher. However, Hart took reasonable steps to abate any known risk, including offering to move Fisher out of his unit, and thus was not deliberately indifferent to Fisher's safety. *See id.* at 847.

Fisher has failed to show that Correll was aware of a substantial risk of harm before the stabbing occurred that would have required him to take reasonable steps, such as securing a floor officer, to avert this danger. Fisher has also failed to establish a dispute as to whether Correll was deliberately indifferent to Fisher's medical needs. Prison officials are deliberately indifferent to a prisoner's serious medical needs only when they "deny, delay, or intentionally interfere with medical treatment." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000). Correll let Fisher pass

after he was made aware of Fisher's injuries, and Fisher's subsequent brief detention at main control did not result in "substantial harm," *see Wood v. Housewright,* 900 F.2d 1332, 1335 (9th Cir. 1990), or constitute an "unnecessary and wanton infliction of pain" as required under the Eighth Amendment, *see Hallett v. Morgan,* 287 F.3d 1193, 1205 (9th Cir. 2002).

Fisher has not provided any evidence demonstrating that Warden Hallahan received any correspondence from him or his wife regarding Fisher's safety. As such, he has failed to show deliberate indifference on Hallahan's part since Hallahan could not have known of any threat to Fisher's safety. Further, because Fisher has failed to demonstrate that Hallahan was personally involved in, or had any knowledge of, Fisher's transfer to Cimarron, and because, as described below, the transfer did not even constitute a constitutional deprivation, Hallahan cannot be held liable under 42 U.S.C. § 1983 simply based on his supervisory position as Warden. *See Jeffers v. Gomez,* 267 F.3d 895, 915 (9th Cir. 2001); *see also Monell v. Dep't of Social Servs.,* 436 U.S. 658, 691-94 (1978).

The district court did not err in dismissing Fisher's claims against former defendants Buck and Robinson. Section 1983 liability only lies where "(1) the defendants acted under color of law, and (2) their conduct deprived [the appellant] of a constitutional right." *Haygood v. Younger,* 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc). Fisher cannot state a claim under § 1983 since he does not have a constitutionally protected right to remain in the same prison facility. *See Meachum v. Fano,* 427 U.S. 215, 225 (1976) (due process does not "protect a duly convicted prisoner against transfer from one institution to another within the state prison system").

petitioner in protective segregation, and (2) petitioner has established a case of deliberate indifference sufficient to avoid summary judgment based upon Hart's failure to follow the Director's Instruction #67 by placing petitioner in protective segregation or documenting his waiver of protective segregation.

The panel's conclusion that "Hart took reasonable steps to abate any known risk [to Fischer], including offering to move Fisher out of his unit," *Fisher v. Stewart*. No. 01-15433, slip op. at 2-3 (9th Cir. June 21, 2002), assumes improperly that Hart did, in fact, make such an offer. In a sworn statement, Fisher stated that "[a]t no time do I recall Hart ever asking me if I would like to be moved to another location." Moreover, if the prison procedures were followed as directed by the Director's Instruction #67,[1] a written waiver of protective segregation would exist, yet none has been brought to the panel's attention. Therefore, in heeding the oft-repeated utterances of the standard of summary judgment, I respectfully submit the panel wrongly concluded no genuine issue of material fact existed as to petitioner's alleged waiver of protective segregation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[D]isputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."); *id.* ("[S]ummary judgment will not lie if the dispute about a material fact

[1] Petitioner brought Director's Instruction #67 to the attention of the panel in his brief, *see* Appellant's Brief, at 26-30, and provided the court with a copy of the directive itself. *See* Appellant's Excerpts of Record, at 236-38.

is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987) ("[A]t summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact."); *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.").

In addition to petitioner's denial that he waived protective segregation, Hart's failure to comply with Director's Instruction #67, which was not discussed in our original opinion, *see Fisher*, slip op. at 2-3 ("Hart took reasonable steps to abate any known risk, including offering to move Fisher out of his unit, and thus was not deliberately indifferent to Fisher's safety."), provides two grounds on which to overturn the panel's decision.

As we found in the original opinion, Hart was presented with sufficient specific information to provide him with knowledge of a substantial risk of harm. Hart was informed of the threat of a reprisal attack at the hands of two inmates, Psycho and Outlaw, as the result of petitioner informing prison officials of their drug use. *See* Director's Instruction § 1.2.4. ("Specific information, including the nature of the threat, the names of the victimizers and the reasons for the threat shall be present and documented. . . . "). Because Hart was informed of the substantial risk of harm, a response by

him was warranted that did not qualify as "deliberate indifference." *See Farmer v. Brennan*, 511 U.S. 825, 828-33 (1994); *see also Martin v. White*, 742 F.2d 469, 475 (8th Cir. 1984).

Director's Instruction § 1.2.2 imposes a duty upon and requires a specific response to a substantial risk of harm: "Staff members *shall* immediately place an inmate in detention status, pending completion of an assessment and investigation, when . . . [r]eliable and verifiable information is received or known indicating that an inmate's safety may be in jeopardy." (Emphasis added). The use of "shall" illustrates that the action is mandatory and not discretionary. *Lopez v. Davis*, 531 U.S. 230, 241 (2001). Therefore, pursuant to the Director's Instruction, Hart was mandated to place petitioner in protective segregation, and the failure to follow the non-discretionary directive could be found by the jury to be deliberate indifference and at the very least would be an important factor in the jury reaching a verdict. *See Berg v. Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986).

Even assuming petitioner orally waived placement in protective segregation, § 1.2.3.1 of the Director's Instruction was not followed: "If an inmate refuses to sign the form [waiving protective segregation], the form shall be signed and witnessed by two staff members. . . ." Again, Hart's failure to comply with a duty imposed upon him by the Director's Instruction could be found by the jury to be deliberate indifference and at the very least would be an important factor in the jury reaching a verdict. *See Berg*, 794 F.2d at 462.

In conclusion, although the failure to follow the Director's Instruction may not directly equate to deliberate indifference, I deem it sufficient to avoid summary judgment because, under the facts and circumstances, a reasonable jury could find for the petitioner. *See Berg*, 794 F.2d at 462 (9th Cir. 1986) ("We believe that in applying the 'deliberate indifference' standard in this particular context, the trier of fact (judge or jury) must take into account the foregoing considerations. Specifically, the trier [of fact] must consider whether, in allegedly exposing the prisoner to danger, the defendant prison official(s) were guided by considerations of safety to other inmates, whether the official(s) took 'prophylactic or preventative measures' to protect the prisoner. *Whitley*, 106 S. Ct. at 1085, and whether less dangerous alternatives were in fact available. . . . In short, the trier must consider context, as well as consequences.").

There is a dire national need to recognize and deter the brutality that occurs in prison environments among inmates. Such brutality will never be deterred when courts continuously provide a protective immunity to prison officials under factual records such as we confront here.

I would grant a rehearing.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 – Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the district of Columbia.

AFFIDAVIT

STATE OF ARIZONA)
ss
COUNTY OF PINAL)

JOHN EDWARD FISHER being duly sworn, upon his oath deposes and says the following:

1. I am an inmate incarcerated by The Arizona Department of Corrections, confined at the Special Management Unit I. of the Eyman Complex located in Florence, AZ.

2. I am the Plaintiff in: *JOHN EDWARD FISHER V. TERRY L. STEWART et al.* Civ. 99-301-TUC-WDB and at the time of the allegations therein, I was confined to units within the Tucson Complex, located in Tucson, Az.

3. I make this affidavit based upon my own personal knowledge and attest that the facts of this case are as follows:

4. That on or about February 1998, I was transferred from the Florence Complex, Maximum Security Facility "Central Unit," to the Tucson Complex, Medium Security Facility, "Santa Rita Unit,"

5. That on or about May 19, 1998, I was prematurley [sic] and erroneously transferred to the Tucson Complex, High Medium Security Facility, "Cimarron Unit," a higher custody facility then [sic] that which I was approved for. See Arizona Department of Corrections Reclassification Score Sheet and Inmate Letter Response, which I received from C.O. III Julie Buck on August 05, 1998. In response, to an Inmate Letter which I authored to her on July 23, 1998. See attachments to Exhibit I. Furthermore, on September 15, 2000, pursuant to Rule 26 of the Federal

Rules on Civil Procedures, I provided the defendants with copies of these documents, with my initial disclosure statement, see Exhibit I hereto.

6. Numerous attempts were made by Mrs. Christine Fisher (my legal spouse) and myself to contact Defendant HALLAHAN, then Tucson Complex Warden, to notify him of my premature and erroneous transfer to the Cimarron Unit. But with no avail, HALLAHAN refused to respond or to take any remedial action.

7. On or about August 2000, I obtained an affidavit from Mrs. Fisher, attesting that she had personally contacted HALLAHAN's office, numerous times with regards to my premature and erroneous transfer to the Cimarron Unit, and with regards to other problems (As outlined in Plaintiff's Amended Complaint.) we had been experiencing at the Tucson Complex, see attachment to Exhibit I. Furthermore, on September 15, 2000, pursuant to Rule 26 of the Federal Rules of Civil Procedures, I provided the defendants with a copy (original document filed as an exhibit to the Plaintiff's "Motion for Appointment of Counsel," filed October 13, 2000) of this document with my initial disclosure statement, see Exhibit I hereto.

8. On May 25, 1998, The Arizona Department of Corrections Central Classification, finalized a decision which not only denied the recommendations of the May 19, 1998 classification hearing but which never authorized my transfer to the Cimarron Unit to begin with, see attachment to Exhibit I.

9. On June 30, 1998, the day before I was stabbed, I requested to speak with Defendant HART, because he was the Cimarron Unit's Sgt. in charge of inmate investigations and Gang related intelligence gathering, and I had

information pertaining to the drug-dealing of two black inmates, who were also cellmates living in the same pod with the Plaintiff, and who were known members or affiliates of a street/prison gang known as the "C.R.I.P.S".

10. When I spoke with HART, I informed him that he had recently removed some white inmates from the Cimarron Unit's general population who owed considerable drug-debts to these two black inmates and these two black inmates were now directing threats of physical violence towards myself and other white inmates to extort us for commissary items as payment for the drug-debts of those white inmates whom HART had already removed from the Cimarron Unit's general population, and that I feared for my own personal safety as well as for other white inmates living in the pod with me.

11. HART asserted that he was aware of the activities of these two black inmates and assured me that sometime that day, both these inmates were being removed from the Cimarron Unit's general population and being placed in detention.

12. Furthermore, in an attempt to help HART to keep these two black inmates in lock-down, I provided him with the information that I had observed them smoking marijuana. However, because I was one of only a couple inmates to observe them doing so, I asked HART not to use this information in obtaining urine samples from the inmates untill [sic] they were secured in detention, because I was worried about being exposed as the informant.

13. At no time do I recall HART ever asking me if I would like to be moved to another location of the Cimarron Units general population.

14. However, neither of the two black inmates whom I had provided information and who lived in the same pod with me and who posed a direct and substantial threat to my personal safty [sic], were removed from the Cimarron general population or my immediate living area on June 30, 1998.

15. Furthermore, despite my request and concerns of being exposed as an informent, on the evening of June 30, 1998, both of these black inmates were requested to provide urine samples, and then left at larg [sic]. Thereby leaving me exposed as an informent [sic] and available for retalleation [sic].

16. On July 01, 1998, sometime that morning one of the two black inmates whom I provided information against was removed from the Cimarron Unit's general population and taken to detention, and leaving his cell-mate (fellow gang member) at larg [sic] to retalleate against me.

17. Sometime around 1:00 p.m. myself and other inmates of my living area were released from our cells for the noon meal. The pod appeared darkend [sic] and without security lighting. There was also no officer on the floor of the pod supervising the inmates in a safe and orderly release from the building. And defendant CORRELL who had been assigned to work the controle [sic] room, in the pod where I was housed and stabbed, was seated and paying no attention to the pod full of inmates whom he had just released from their cells.

18. It should also be noted, that even though the defendants claim that on July 1, 1998 when I was stabbed, the unit was opporating [sic] short staffed, thus they were unable to provide a floor officer for CORRELL, there were

at least two officers outside the building performing pat searches on inmates, (as was mandatory at all meals) prior to allowing them to proceed to chow, which CORRELL could have used to provide security in the pod, prior to patting down the inmates and allowing them to proceed to lunch.

19. However, it was at this time that the remaining black inmate whom I had provided information on, came charging at me calling me a "snitch" and a fight insued, durring [sic] which time this inmate stabbed me twice, puncturing one of my lungs and causing me a reasonable risk of death.

20. I attest that this fight took place in the open-area of the pod, and that the "Blind Spot" which CORRELL claims concealed the attack is nothing more then [sic] a "small niche" beneath a staircase, and not nearly larg [sic] enough to conceal two men fighting.

21. I attest that my cell at the Cimarron Unit "4C12" was not located "Behind" a staircase, relative to the view from the control room and the entire cell front could be viewed from therein.

22. After the fight had stopped, another inmate helped me back to my cell, where he pulled an ice-pick type shank out of my back. It was also at this time that [sic] coughed up blood and summerized [sic] that I was bleeding internally.

23. Shortly thereafter 1:00 p.m. the inmate whom had aided me back to my cell, began kicking on the cell front untill [sic] CORRELL responded by electronically opening it from the controle [sic] room. I thus exited the cell and walked up a set of stairs to speak with CORRELL

and did so face to face and at eye level with each other. I told CORRELL that I had been stuck, that I was having a hard time breathing and that I need to see medical right away. Defendant CORRELL then look [sic] at his watch and stated "It's almost shift change" and then through a turn-style, handed me a pass to the Health Unit and told me "You better go now." CORRELL then electronically accessed two security doors so that I and the inmate who had been assisting me could proceed to the Cimarron health care unit.

24. When I reached the Cimarron Units Main Controle [sic] room necessary to pass through in accessing the Cimarron health care unit, the officer stationed therein would not allow me to proceed. My name, housing location and the name or the officer who sent me was requested and I was then instructed to "stand by." Having waited a considerable length of time and bearly [sic] hanging on to consciousness in the hot July sun. I observed HART standing nearby and told the inmate who had been helping me that he could go and that I was going to have HART escort me into the health care unit.

25. On July 1, 1998, as indicated in my Amended Complaint and now cooborated [sic] in "Information Reports" and "Medical Records" provided by the defendants, it took approximately forty (40) minutes, before I began receiving medical attention to a life threatening injury. Despite the fact that the building I was assigned to was only several hundred feet away from the Cimarron health care unit.

26. On July 1, 1998, a paramedic unit called "HEAT 53" was called to transport me to a health care facilit [sic] outside of the Tucson Complex and ordered to take me to St. Mary's hospital. However, as I recall, sometime in

route the paramedics became more concerned about getting me immediate attention and arranged to have the University Medical Center's, Trauma Unit, treet [sic] and stabelize [sic] me before transporting and addmitting [sic] me to St. Mary's hospital.

27. In September 2000, I was able to obtain a copy of my Medical Records from July 1, 1998, at the University Medical Center, from their Medical Information Services Department. See attachment of Exhibit H. Furthermore, on October 16, 2000, pursuant to Rule 26 of the Federal Rules of Civil Procedures. I provided copies of these documents to the defendants in my disclosure statement, see Exhibit H hereto.

The foregoing factual allegations create genuine issues of material facts and will, if proved at trial, entitle me to judgment, Therefore the Defendants Motion for Summary Judgment should not be granted.

By: /s/ John E. Fisher
Mr. JOHN EDWARD FISHER
Pro Se Plaintiff.

SUBSCRIBED AND SWORN TO BEFORE ME this 13th day of November 2000.

[SEAL] OFFICIAL SEAL
KATHY E. COOPER
Notary Public – State
of Arizona
PINAL COUNTY
My Comm. Expires
Nov. 16, 2002

NOTARY PUBLIC SEAL

/s/ Kathy E. Cooper
NOTARY PUBLIC
SIGNATURE

ARIZONA DEPARTMENT OF CORRECTIONS
DIRECTOR'S OFFICE
MEMORANDUM

TO: **DISTRIBUTION**

FROM: **/s/ Terry L. Stewart, Director**

DATE: **July 1, 1998**

SUBJECT: **Director's Instruction #67 – Protective Segregation**

Effective immediately delete Director's Instruction #67 Dated March 17, 1998 and replace with the following.

The Deputy Director, Prison Operations, shall, in coordination with the Administrator of Staff Development and Training, ensure the development and delivery of appropriate initial and in-service training is provided to all Wardens, Deputy Wardens, Administrators, Investigations Staff, Classification Staff and to any other staff directly involved in the implementation of the Protective Segregation process.

PURPOSE

The purpose of this Director's Instruction is to provide procedures for the separate placement of inmates who need to be segregated from the general population.

PROCEDURES

805.01 REQUEST FOR PLACEMENT IN PROTECTIVE SEGREGATION (PS) STATUS

1.1 *Voluntary Placement*: Inmates requesting voluntary placement into PS may make the request verbally or in writing to any staff member.

1.1.1 If verbal, it *shall* be followed with written facts provided by the inmate, unless the inmate is unable to provide such facts when first questioned regarding the request.

1.1.2 The staff member *shall* immediately isolate the inmate in a safe area and notify the shift commander.

1.1.3 The staff member shall initiate a Protective Segregation (PS) Placement Review Request, ADC Form 805-1P, including specific information (who, what, where, when, etc.) obtained from the inmate to indicate why PS may be necessary.

1.1.3.1 Additional relevant information, including the documentation of staff activity (necessary whenever an inmate requests PS), shall be included in an Information Report (IR), ADC Form #40000029, appended to the Form 805-1P.

1.1.4. The shift commander shall place the inmate into detention status pending completion of an investigation.

1.1.5 A Form 2B – Assignment to Protective Investigative Detention, ADC Form #30000013, shall be served on the inmate.

1.1.6 All documentation shall be forwarded to the Deputy Warden or Administrator no later than the following work day.

1.1.7 A PS Review Hold shall be documented on the AIMS Offender Comment Screen under the "Protective Review Hold" (PC) Comment Type.

1.1.8 Effective March 17, 1998, and in accordance with this instruction, the PS File shall be requested on all inmates with a previous review for PS.

1.2 *Involuntary Placement*: All recommitted inmates, including release violators, who have had a prior PS placement in any previous incarceration or were pending the protective segregation process upon release, shall be evaluated by the Deputy Warden or Administrator for determination of the need for an involuntary PS assessment.

1.2.1 The evaluation shall be documented on the PS Screening Form, Attachment #1, and on the AIMS Offender Comment screen under the "Institutional Status" (02) Comment Type.

1.2.2 Staff members shall immediately place an inmate in detention status, pending completion of an assessment and investigation, when:

1.2.2.1 An inmate is re-incarcerated, including release violators, who was released from a PS location, or was in an approved PS status and pending movement at the time of release.

1.2.2.2 Reliable and verifiable information is received or known indicating that an inmate's safety may be in jeopardy.

1.2.3 The staff member shall complete a Protective Segregation (PS) Placement Review Request, 805-1P Form.

1.2.3.1 If an inmate refuses to sign the form 805-1P, the form shall be signed and witnessed by two staff members with a notation stating "The Inmate Refused to Sign".

1.2.4 Specific information, including the nature of the threat, the names of the victimizers and the reasons for the threat, shall be present and documented on an Information Report, ADC Form #40000029, and attached to the 805-1P form.

1.2.5 A Form 2B – Assignment to Protective Investigative Detention, ADC Form #30000013, shall be served on the inmate.

1.2.6 All documentation shall be forwarded to the Deputy Warden or Administrator no later than the following work day.

1.2.7 A PS Review Hold shall be documented on the AIMS Offender Comment screen under the "Protective Review Hold" (PC) Comment Type.

1.2.8 The PS file shall be requested on all inmates who were previously reviewed for PS in accordance with this Instruction.

Supreme Court U.S
FILED
FEB 18 2003
CLERK

No. 02-662

In The
Supreme Court of the United States

JOHN EDWARD FISHER,

Petitioner,

v.

MARK HART,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Farmer v. Brennan held that prison officials are not liable for deliberate indifference when, knowing of a risk to an inmate's safety, they reasonably respond to that danger. Should this Court grant certiorari to announce a rule that the courts must judge the reasonableness of a response in light of the circumstances when no reported opinion has failed to do so?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Mark Hart, respectfully requests this Court to deny John Edward Fisher's Petition for Certiorari seeking review of the memorandum decision of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

As the Petitioner notes, Sergeant Mark Hart is the only Respondent implicated in the Petition. Sergeant Hart offers the following in addition to the Petitioner's Statement of the Case.

There is no evidence that any inmate witnessed Sergeant Hart talking with the Petitioner. Nonetheless, Hart agreed to the Petitioner's request to furnish disciplinary paperwork to use as a cover story in case anyone saw their meeting. Pet. App. 7-8.

Contrary to his assertion, the Petitioner did not deny that Sergeant Hart offered to move him to another prison location after their conversation; his supposed refutation of that fact was merely his statement that he could not remember it happening. Pet. App. 8.

There is no evidence that the Petitioner's assailant committed prior acts of prison violence.

The Petitioner was treated for his injury at a Tucson hospital and was released, with his physician noting that "[t]he patient has done well." Dckt. 49, Df. Ex. E.

REASONS TO DENY THE PETITION

The Petitioner urges this Court to grant certiorari for two reasons. He first requests the Court to command the lower courts to give effect to the reasonableness element of *Farmer*'s reasonable-response requirement. Pet. at 14. Second, he urges the Court to reconcile "the circuits' inconsistent approaches to determining whether a prison official's response to a known risk of harm was a reasonable response." *Id.* at 16. Because the applicable rules of law are well defined and there is no conflict regarding their application, the Petition should be denied.

1. The Law Governing Eighth Amendment Analysis Is Well-Settled and Requires No Further Clarification.

The Petition takes aim at *Farmer's* holding that prison officials who know of a substantial risk to an inmate's safety may nonetheless escape liability "if they responded reasonably to the risk, even if harm was not averted." *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). In particular, the Petitioner claims that this Court created a "doctrinal vacuum" by not expressly holding that whether a prison official responded reasonably to a risk should be gauged by the facts and circumstances in each individual case. Pet. at 6. This argument does not give due credit to either this Court's holding or to the lower courts' interpretations of it.

The law governing Eighth Amendment analysis is well-developed. Focusing on its prohibition against cruel and unusual *punishment*, this Court held that only deliberate indifference to an inmate's health or safety, as manifested by "unnecessary and wanton infliction of pain,"

violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Building on *Estelle*, it later held that a prison official cannot inflict punishment in violation of the Eighth Amendment unless he has a "culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Most recently, in *Farmer v. Brennan*, this Court outlined in detail the proper analysis for inmate-on-inmate assault cases:

> [A] prison official cannot be found liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

511 U.S. at 837. It also held that officials escape liability if, knowing of a substantial risk of serious harm, they respond reasonably to the risk:

> In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "'reasonable safety'". . . .

Id. at 844 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). This standard, the Court noted, "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Id.* at 845 (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979) (Kennedy, J.)). The Court summarized: "Whether one puts it in terms of duty or deliberate

indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.*

The rules of law that governed the Ninth Circuit's opinion are set forth in *Farmer* and its progenitors. There is nothing ambiguous about *Farmer*'s holding that prison officials escape liability if they responded reasonably to a significant risk to an inmate, even if harm was not ultimately averted. Whether prison officials responded reasonably must obviously be evaluated in light of the underlying circumstances, and neither the Ninth Circuit's memorandum decision nor any of the Petitioner's cited cases hold otherwise.

Indeed, the Petitioner cites no case that has ever held that an inquiry into the reasonableness of a prison official's conduct can or should be made without giving due regard to the attendant circumstances. Suggesting otherwise comports with neither common sense nor this Court's jurisprudence. As this Court held – in a Fourth Amendment context – "'[t]he test of reasonableness . . . is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case. . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). There is no suggestion in any of the cases the Petitioner cites that the court ignored the particular facts and circumstances.

2. There Is No Conflict in Interpreting the Reasonable-Response Requirement.

The Petitioner argues that the Ninth Circuit's memorandum decision and opinions from the Seventh and

Fourth Circuits conflict with opinions from other circuits by failing to construe *Farmer*'s reasonable-response holding in light of the surrounding facts and circumstances. Pet. at 8. But he cannot point to any language from these decisions supporting his interpretation.

The Ninth Circuit here held that "Hart took reasonable steps to abate any known risk, including offering to move Fisher out of his unit." Pet. App. 2. The fact that it did not expound at length on the facts is unsurprising, given that it issued a memorandum decision. Memorandum decisions cannot be cited as precedent to or by any court in the Ninth Circuit. 9th Cir. R. 36-3. Thus, they are addressed primarily – if not exclusively – to the parties, who presumably are already familiar with the facts and circumstances.

Furthermore, neither *Lewis v. Richards*, 107 F.3d 549 (7th Cir. 1997), nor *Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001), supports the Petitioner's contention.

The Petitioner claims that "[t]he *Lewis* majority's approach is tantamount to a rule that officials who do *something* in response to the threat have responded reasonably *per se*." Pet. at 8-9. But *Lewis* held no such thing. In fact, *Lewis* does not even mention *Farmer*'s reasonable-response language, other than in passing in the concurrence. 107 F.3d at 556, 557. Instead, the court affirmed summary judgment for prison officials based on their ignorance of the risk: "Lewis has failed to present evidence sufficient for a reasonable factfinder to conclude that the defendants knew of the impending risk to his safety, and consciously refused to prevent it." *Id.* at 555.

The Petitioner also mischaracterizes *Brown*. The court did not, as the Petitioner suggests, "[i]n essence [hold] that

an official who takes *some* action in response to a known risk responds reasonably as a matter of law." Pet. at 10. Instead, it laid out the facts and law in painstaking detail. *See* 240 F.3d at 385-86, 388-90. It then analyzed the actions of the two pertinent appellees in extended detail in light of those facts and circumstances. *See id.* at 390-91.

The Petitioner is wrong in asserting that the Fourth, Seventh, or Ninth Circuits did not apply the *Farmer* test as it was evidently intended: taking into account the facts and circumstances. Like the Fourth Circuit in *Brown*, it must be assumed that the Ninth Circuit here analyzed the reasonableness of Hart's response in light of the underlying facts and circumstances. It performed its job no differently than the courts in the cases that the Petitioner cites as examples of the proper *Farmer* analysis: *Giroux v. Somerset County*, 178 F.3d 28 (1st Cir. 1999); *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997); *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614 (2d Cir. 1996); *Reece v. Groose*, 60 F.3d 487 (8th Cir. 1995).

The Petitioner's criticism therefore concerns not the proper interpretation of *Farmer* but whether the Ninth Circuit properly applied summary-judgment standards and whether in so doing it reached the correct result. This issue does not merit granting certiorari, as we address below.

3. The Petition Does Not Present an Eighth Amendment Question but at Most Argues That the District and Appellate Courts Wrongly Applied the Summary-Judgment Standard.

At best, the Petitioner's position amounts to an argument that the Ninth Circuit made erroneous factual findings or misapplied *Farmer*'s properly stated rule of law. Even if this were true, the Court should not grant certiorari.

Getting past the now-debunked assertion that the circuits have split in their analysis of the *Farmer* reasonable-response rule, the Petition boils down – at best – to an argument that the district court and court of appeals improperly applied the rules governing summary-judgment practice by crediting testimony they should not have credited. The dispute centers on whether the evidence submitted at the summary-judgment phase was sufficient to support the district court's finding that "Hart also offered to move Fisher to another location. Thus, Hart offered Fisher deniability and physical isolation." Pet. App. 10. Hart stated that he offered to move the Petitioner. Excerpts of Record ("ER") 85; 221 ¶ 7. The Petitioner responded: "At no time do I recall HART ever asking me if I would like to be moved to another location of the Cimarron Units [sic] general population." Pet. App. 26. Hart argued that this response only showed a lack of memory of the event, which was insufficient to raise a dispute as to the fact. *See, e.g., I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51, 55 (1st Cir. 1999) (plaintiff's "mere lack of recollection does not suffice to create an issue of fact").

The core of Petitioner's argument in this Court is that the facts were actually in dispute:

> Relying on Hart's contention that he offered to move Fisher the Ninth Circuit disregarded evidence that when Hart allegedly made that offer, he also assured Fisher that the two threatening inmates would be segregated. Contrary to Hart's assurances, both inmates were tested for drug use – thereby exposing Fisher as an informant – and both were returned to Fisher's unit. Only Psycho was eventually detained. Hart did not even provide Fisher with a warning, much less renew his alleged offer to move Fisher in light of these changed circumstances. Moreover, the prison's own internal policies required Hart to move Fisher upon receiving knowledge that Fisher's safety might be in jeopardy. Hart failed to do so. *On these facts, the Ninth Circuit improperly concluded that Hart responded reasonably as a matter of law.*

Pet. at 10 (emphasis added); *see also id.* at 14 (arguing that "a jury could justifiably find [Hart's response] so minimal and misleading as to fail the *Farmer* standard").[1]

In other words, the Petitioner is complaining simply that the evidence was not uncontroverted, summary

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[1] To the extent the Petition equates *Farmer* reasonableness with simple negligence, it is incorrect. *See, e.g., Farmer*, 511 U.S. at 835 ("deliberate indifference describes a state of mind more blameworthy than negligence"); *cf. Daniels v. Williams*, 474 U.S. 327, 328 (1986) (prison official's negligent failure to protect inmate does not violate due process).

judgment was improper, and the case should have been left to a jury. This is consistent with his argument below:

> Summary judgment based on Hart's alleged offer to move Mr. Fisher was improper for a variety of reasons. Most fundamentally, Mr. Fisher disputes that Hart made any such offer. In his affidavit, Mr. Fisher stated: "At no time do I recall Hart ever asking me if I would like to be moved to another location of the Cimarron Units [sic] general population." ER 231. Hart asserts in his interrogatory responses that he offered to move Mr. Fisher to "the North Yard." ER 185. One says the offer was made; the other says it was not. Because Mr. Fisher was the nonmovant in the district court, his version of the facts must be accepted as true. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Appellant's Supplemental Reply Brief at 10.[2]

Even assuming that the Petitioner is correct, at most this merely demonstrates a failure to conduct the proper summary-judgment analysis by resolving fact disputes. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine whether there is a genuine issue for trial"). Thus, this case is inappropriate for certiorari. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted

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[2] As noted, Petitioner's inability to recall Hart's offer does not create an issue of fact. *See I.V. Servs.*, 182 F.3d at 55.

error consists of . . . the misapplication of a properly stated rule of law.").

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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February 18, 2003

(3)

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No. 02-662

In The
Supreme Court of the United States

JOHN EDWARD FISHER,

Petitioner,

v.

MARK HART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court declared that prison officials who have actual knowledge of a substantial threat to inmate safety must respond "reasonably" to that threat. This "reasonable response" test has engendered confusion and conflict in the courts regarding the test's jurisprudential basis and proper application. Respondent Mark Hart sidesteps these important issues and presents a misleading view of relevant Eighth Amendment failure-to-protect precedent.

Rather than carefully analyzing the case law, Hart recasts *Farmer*'s language into an unbounded "facts and circumstances" approach that veils both the doctrinal complexity of *Farmer*'s reasonable-response test and the difficulty that the circuits have had in applying that test consistently. That inconsistency is apparent in the Ninth Circuit's conclusion that Hart responded reasonably as a matter of law despite the inadequacy of his misleading gestures that not only failed to protect Fisher from retaliation but also rendered him more vulnerable to attack. Notwithstanding Hart's contention that a single disputed fact renders this case inappropriate for certiorari, the undisputed record affords an opportunity for the Court to clarify the meaning and proper application of the reasonable-response test. This Court should grant Fisher's Petition to provide needed guidance to prison officials, litigants, and the courts regarding the duties a prison official must fulfill upon identifying a substantial threat to an inmate's safety.

A. Hart's Mischaracterization of the *Farmer v. Brennan* "Reasonable Response" Test Masks the Substantial Uncertainty Surrounding that Test.

Hart dramatically oversimplifies *Farmer*'s reasonable-response test and fails to address a key argument in Fisher's Petition: that the *Farmer* Court left open both the

jurisprudential basis of the reasonable-response test and the analysis to be employed once a plaintiff establishes that a prison official had actual knowledge of a substantial threat to an inmate's safety.

1. The *Farmer* Reasonable-Response Test Is Not Limited to an Analysis of "Facts and Circumstances."

Farmer established a subjective state-of-mind requirement for determining whether prison officials knew of a substantial threat to inmate safety. *See* 511 U.S. at 838. Hart erroneously contends that *Farmer* announced a "holding" that "[w]hether prison officials responded reasonably must obviously be evaluated in light of the underlying circumstances," and he mischaracterizes *Farmer* as merely calling for an analysis of "the attendant circumstances" and "the particular facts and circumstances" of each case. Opp. at 4.

Farmer does not bear out these assertions. After establishing the state-of-mind requirement, *Farmer* briefly described a reasonable-response test, but did not apply that newly announced test to the facts. *See Farmer*, 511 U.S. at 844-45. Moreover, *Farmer* declined to specify the doctrinal basis for the reasonable response test: "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

In light of the uncertainty expressed by *Farmer*, Hart's characterization of *Farmer*'s reasonable-response test as "well-developed" is misleading. Fisher's Petition presents crucial questions that this Court has never addressed: when, as in Fisher's case, a prison official is shown to have had subjective knowledge of a substantial threat to inmate safety, does *Farmer* create a duty to respond to that threat in a reasonable manner; and by

what standard or rule is the official's response to be judged?

2. The Confusion and Conflict in Eighth Amendment Cases Demonstrate the Need for Clarification of the *Farmer* Reasonable-Response Test.

The circuits' attempts to define the parameters of *Farmer*'s reasonable-response test also illustrate the uncertainty surrounding that test. The courts of appeals have repeatedly pointed out that *Farmer* did not thoroughly address the duties incumbent on prison officials who are shown to have the requisite knowledge of a substantial threat. *See* Pet. at 7.

This lingering uncertainty has manifested itself in two ways. First, courts are uncertain whether *Farmer*'s reasonable-response test is a secondary inquiry to be applied once a plaintiff establishes that the prison official knew of a substantial threat to inmate safety (*i.e.*, a residual duty), or rather an inseparable part of the overall deliberate-indifference test. For example, in *Gibbs v. Franklin*, the Seventh Circuit determined that *Farmer* had not established any new tests beyond the subjective state-of-mind requirement:

> [Plaintiff] reads into the Supreme Court's opinion in *Farmer* a holding that a prison guard's response to actual knowledge of an impending attack must be judged against a standard of objective reasonableness. However, *Farmer* did not squarely address the question of a prison guard's duties or obligations toward an inmate.

49 F.3d 1206, 1208 (7th Cir. 1995), *called into question on other grounds*, *Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996).

In contrast, the Eighth Circuit held that *Farmer* created an affirmative duty: "[T]his duty requires prison officials to take reasonable measures to abate substantial

risks of serious harm, of which the officials are aware." *Reece v. Groose*, 60 F.3d 487, 491 (8th Cir. 1995).

The Second Circuit has treated the reasonable-response test as a component of *Farmer*'s state-of-mind assessment:

> The second prong of the deliberate indifference test, culpable intent, in turn, involves a two-tier inquiry. Specifically, a prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.

Hayes v. N.Y. City Dep't of Corr., 84 F.3d 614, 620 (2d Cir. 1996).

Still other circuits have declined to reach any conclusions about the appropriate framework: "While the Court left open the question of whether the 'reasonable response' prong of *Farmer* is part of the state of mind requirement or whether it instead stems from the duty to 'ensure reasonable safety,' ... this prong nonetheless protects officials who act reasonably in response to a known risk." *Brown v. Harris*, 240 F.3d 383, 389 (4th Cir. 2001) (internal citations omitted). As these examples illustrate, there is significant confusion and conflict among the circuits regarding the doctrinal basis of *Farmer*'s reasonable-response test.[1]

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[1] *Farmer* in part based its definition of "deliberate indifference" on the definition of "criminal recklessness" in the American Law Institute's MODEL PENAL CODE § 2.02(2)(c). *See* 511 U.S. at 837. The Court's use of this definition may suggest another plausible interpretation of the reasonable-response test: that the "reasonableness" of the prison official's response to a known threat is actually a form of proof that the official possessed a sufficiently culpable state of mind. *See* Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 292 (1995) (noting that under MPC definition of recklessness, actor's culpable state of

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Second, for those courts that analyze the reasonable-response test as a duty arising from an official's knowledge of a threat, it is not clear by which standard or rule an official's conduct must be judged. *Farmer* established that the *mens rea* of deliberate indifference is a step beyond mere negligence; *Farmer* did not explain, however, whether the subsequent reasonable-response test incorporates a negligence standard.

Some courts have held that deliberate indifference differs from negligence primarily in that "constructive" or "objective" knowledge will suffice for the latter but not the former. *See Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997); *Langston v. Peters*, 100 F.3d 1235, 1238 (7th Cir. 1996). Other courts have acknowledged *Farmer*'s use of the term "reasonable" but repudiated any association between the reasonable-response test and negligence: "the duty to act reasonably is a negligence standard, and *Farmer* stands for the broad proposition that deliberate indifference includes something more than negligence but less than actual intent to harm." *Newman v. Holmes*, 122 F.3d 650, 653 (8th Cir. 1997). Thus, while it is uncontroverted that the state-of-mind requirement of deliberate indifference is more demanding than common law negligence, the standard invoked by *Farmer*'s secondary "reasonableness" test remains uncertain. *See* Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 303 (1995) ("[Under *Farmer*, the] measure for determining the 'reasonableness' of defendants' actions remains ambiguous."). A careful reading of relevant Eighth Amendment precedent belies Hart's assurances that *Farmer* created a doctrinally consistent "facts and circumstances" test with which lower courts have had little difficulty.

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mind may be established by evidence of "the actor's conduct in the face of the risk").

B. Hart Attempts to Reconcile a Circuit Split by Recasting the Reasonable-Response Test as a Generalized "Facts and Circumstances" Test.

The practical effect of this analytical confusion is the circuits' inability to apply *Farmer*'s reasonable-response test consistently. Hart's re-invention of the *Farmer* holding as a generic "facts and circumstances" test artificially conceals the split among the circuits. Hart argues that because the courts "[took] into account the facts and circumstances," there is no conflict. In fact, Fisher does not argue that courts are merely failing to analyze the facts and relevant law. Rather, his Petition demonstrates that in many cases when an official's response to a known risk is minimal or even counterproductive, some circuits have failed to give meaning to the word "reasonable" as it is used in *Farmer*.

By arguing that the Fourth, Seventh, and Ninth Circuits applied the *Farmer* reasonable-response test in exactly the same manner as the First, Second, Third, and Eighth Circuits, Hart again substitutes generalization for careful analysis. Opp. at 4-6. Hart first argues that the Ninth Circuit's one-sentence conclusion that Hart responded reasonably as a matter of law is "unsurprising, given that it issued a memorandum decision,"[2] Opp. at 5,

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[2] To the extent that Hart argues that the unpublished nature of the *Fisher* decision diminishes any potential circuit split, he ignores precedent. This Court has not been reluctant to grant certiorari in unpublished cases to address circuit splits. *See, e.g., Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57 (2000); *Carter v. U.S.*, 530 U.S. 255 (2000); *Johnson v. U.S.*, 529 U.S. 694 (2000); *Lynce v. Mathis*, 519 U.S. 433 (1997). *Farmer* itself involved a summary affirmance by the Seventh Circuit without opinion. *See Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), *vacated by* 511 U.S. 825 (1994). In addition, the mere fact of non-publication does not militate against a grant of certiorari. *See, e.g., C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) ("[T]he fact that the Court of Appeal's order under challenge here is unpublished carries no weight in our decision to review the case."); *see*

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but does not attempt to reconcile the court's terse holding with the reasonable-response test in *Farmer*. Here, the Ninth Circuit ruled that Hart's decisions to expose Fisher as the informant while leaving the next day's attacker in the same unit and to completely disregard established procedures for eliminating the threat constituted a reasonable response as a matter of law. That decision does not comport with either *Farmer* or the approach espoused by the First, Second, Third, and Eighth Circuits.

Hart's analysis of the decisions from the Seventh and Fourth Circuits is similarly unpersuasive. Hart characterizes the *Lewis v. Richards* holding as relying solely on the prison officials' ignorance of the risk. Opp. at 5. However, the *Lewis* court explicitly credited the inmate's version of the facts (as required on summary judgment) by assuming "that the defendants were aware of the fact that Lewis needed protection." 107 F.3d 549, 554 (7th Cir. 1997). The court nonetheless ruled that "[h]ad the defendants in this case simply refused to do anything, Lewis' case might survive summary judgment." *Id.* at 553. Moreover, Hart disregards the portions of Judge Flaum's concurring opinion that identify the incongruence in the *Lewis* majority's approach and explain that "[m]inimal gestures in response to known risks will not absolve prison officials of liability." *Id.* at 557 (Flaum, J., concurring).

Next, Hart argues circuitously – and circularly – that because the Fourth Circuit in *Brown v. Harris* "laid out the facts and law in painstaking detail" and performed its analysis "in extended detail in light of those facts and circumstances," the court gave meaning to the *Farmer* reasonableness requirement. Opp. at 6. This argument

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also Smith v. U.S., 502 U.S. 1017, 1020 (1991) ("Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.") (Blackmun, O'Connor, & Souter, J.J., dissenting from denial of certiorari).

does not challenge Fisher's contention that the Fourth Circuit twisted *Farmer*'s "reasonable response" test into an "any response" test. Indeed, the *Brown* court noted that the prison official "took less action than he could have, and by his own admission, should have," but nonetheless concluded that the official's response was reasonable as a matter of law. 240 F.3d at 390-91.

Rather than respond to Fisher's argument that courts have misinterpreted *Farmer* to require merely "any response" or a "minimal response" to known threats, Hart conceives an all-encompassing "facts and circumstances" test that, by its generality and abstraction, could shroud circuit splits on nearly any constitutional issue.

C. Fisher's Petition Addresses the Need for Clarification of the *Farmer* Reasonable-Response Test – Not Whether the Ninth Circuit Properly Applied Summary Judgment Standards.

Finally, Hart asserts inaccurately that Fisher's sole argument is that the Ninth Circuit improperly weighed evidence at the summary judgment stage. In doing so, Hart focuses exclusively on Fisher and Hart's conflicting versions of the alleged offer to move Fisher. Opp. at 7-10. Fisher *does* argue that the Ninth Circuit improperly affirmed the district court's grant of summary judgment, but not merely because the court credited Hart's testimony regarding the offer to move.[3] In affirming summary judgment, the Ninth Circuit

[3] Hart's use of Fisher's briefing before the Ninth Circuit does not prove otherwise. Fisher's arguments in that forum were consistent with that court's role: a *de novo* review of the district court's grant of summary judgment. Fisher's petition to this Court, in contrast, addresses an issue raised by the Ninth Circuit's flawed analysis: whether this Court's opinion in *Farmer* is in need of clarification with regard to the type of response required once an official is shown to have the requisite state of mind.

(like the Fourth and Seventh Circuits) applied a standard that absolves prison officials who know of a substantial risk to inmate safety even if they take no reasonable measures to prevent it. Regardless of whether Hart made any offer, his inadequate gestures both failed to protect Fisher from violent retaliation and increased the risk that such retaliation would occur. Hart tested both inmates and returned them to Fisher's unit without any warning to Fisher – in the process disregarding an easily implemented procedure that required Hart to segregate Fisher. Pet. at 14-15.

Fisher's Petition concerns far more than the Ninth Circuit's inadequate review of a particular summary judgment. It asks this Court to clarify for future cases the meaning and proper application of *Farmer*'s reasonable-response requirement and thereby mitigate the confusion and conflict now occurring in the courts. That confusion and conflict is fostering a form of immunity for prison officials from liability for serious injuries and deaths caused by uncontrolled prisoner violence. As Judge Lay admonished in this case, the brutality of inmate violence "will never be deterred when courts continuously provide a protective immunity to prison officials under factual records such as we confront here." Pet. at 5.

CONCLUSION

For the foregoing reasons, Petitioner John Edward Fisher respectfully requests that this Court grant his petition for certiorari.

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